No. _____

In The

Supreme Court of the United States

CHARLES LEE SEMPLE, JR.,
Administrator of the Estate of Deborah Louise Semple, Deceased, et al.,

Petitioners,

v.

THE CITY OF MOUNDSVILLE,
a Municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The Petition for Writ of Certiorari accurately identifies the parties to the instant proceeding.

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I. RELEVANT FACTS

The instant appeal arises out of the tragic murder of Deborah Semple ("Deborah"), her brother Scott Semple, and her friend James Garrison by Deborah's estranged companion, Michael Suarez ("Suarez") on August 6, 1994, in Moundsville, West Virginia. Suarez subsequently committed suicide, and this entire sequence of events occurred in the presence of the couple's two young daughters.

Although the couple began living together in 1982, the record establishes no admissible evidence of police involvement in the couple's personal affairs until January 15, 1989. J.A., Vol. III, 1321. On that date, after an alleged encounter with Suarez and after consulting with the City of Moundsville Police Department ("Moundsville Police"), Deborah filed misdemeanor battery charges against Suarez in Marshall County Magistrate Court. J.A., Vol. III, 318. Ten days later, Deborah requested the charges be "withdrawn." J.A., Vol. III, 319. Accordingly, upon motion by the Marshall County Assistant Prosecuting Attorney, Magistrate Mark A. Kerwood dismissed the charge against Suarez. J.A., Vol. III, 320. For almost five and a half years, no further problems between the two were reported to the City of Moundsville or its agencies.

After the couple's separation in May 1994, Deborah contacted the Moundsville Police from a pay phone located at the Gast News Stand in Moundsville on June 21, 1994, to report a domestic situation. J.A., Vol. I, 26, 58, 80; J.A., Vol. V, 2060 at "0438." The Moundsville Police responded immediately and assisted Deborah in removing the children from the home; however, Deborah stated that

she did not wish to have Suarez arrested. J.A., Vol. III, 1185-88. In addition, the responding officers did not witness any "credible corroborative evidence" which would have empowered a warrantless arrest of Suarez. J.A., Vol. III, 1185-88. *See also*, W.Va. Code § 48A-2A-14(b)(1-4). That evening, the officers advised Deborah of her rights as an alleged victim of domestic violence and provided her with a copy of the Moundsville Police Department Victims Information Sheet. J.A., Vol. I, 374. After being assisted by the Moundsville Police, Deborah filed a Family Violence Petition at the Magistrate Office, and Magistrate Kerwood issued a Family Violence Temporary Protective Order ("Temporary Order"). J.A., Vol. I, 321-23.

Magistrate Kerwood conducted a "final hearing" on the complaint on June 24, 1994, and although Suarez did not appear at the hearing, the Magistrate awarded Suarez limited visitation rights with the couple's children through arrangements to be made with third parties. Suarez, however, was prohibited from contacting Deborah. J.A., Vol. I, 331-32.

Shortly after midnight on June 27, 1994, the Moundsville Police received a call from Patricia Scott,[1] requesting officer assistance at Deborah's home. The Moundsville Police responded immediately, and upon arrival at the residence learned that Suarez had broken a window, gained entry to the residence, and attacked Deborah. J.A., Vol. III, 1196-99. Suarez was arrested and charged with three offences in violation of West Virginia Code: (1) Felony Wanton Endangerment with the Use of a

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[1] Deborah's mother, now known as Patricia Rogers.

Firearm; (2) Felony Malicious Assault; and (3) Misdemeanor Stalking. J.A., Vol. I, 336-38. Suarez was then arraigned before Magistrate William Anderson, and bond was set at $75,000. J.A., Vol. I, 339. After bond was posted, Suarez was released from custody on July 1, 1994. J.A., Vol. I, 341. Upon learning Suarez had "made bail," the Moundsville Police Department unsuccessfully attempted to notify Deborah. Unable to reach her, the Department notified both Deborah's mother and father of Suarez's release. J.A., Vol. I, 346-47.

From the time of Suarez's release on July 1, 1994, until July 7, 1994, the Moundsville Police received no reports of physical violence against Deborah. However, on July 3, 1994, Deborah's father, Charles Semple, Jr., ("Mr. Semple"), called the Moundsville Police and advised that Suarez had been verbally abusive during a telephone call. J.A., Vol. IV, 1554-59. In response, Officer Murray went to Mr. Semple's residence and, after ascertaining Suarez had made no threats against Deborah, advised Mr. Semple to contact a magistrate and have the protective order expanded to include his residence as a "protected location." *Id.* Thereafter, Mr. Semple contacted Magistrate David Buzzard, who advised Mr. Semple that "nothing could be done." J.A., Vol. III, 1365-66.

On July 6, 1994, Deborah contacted the Moundsville Police from a telephone with a Wheeling exchange and reported that Suarez had been telephonically harassing her, her father, her babysitter, and her housekeeper. J.A., Vol. I, 354 at 1948-53. Arrangements were made for Deborah to report these potential violations to Magistrate Kerwood, who had issued the protective order. *Id.*

On July 7, 1994, prior to her scheduled appearance in front of the Marshall County Grand Jury, Deborah met with a Marshall County Assistant Prosecuting Attorney and the Prosecuting Attorney's Office's Investigator. During that meeting, Deborah stated her belief that Suarez did not pose a threat of violence and was a good father, and added that she did not wish Suarez further incarcerated. J.A., Vol II, 668-73. After the trio discussed potential options regarding Suarez's alleged telephonic harassment, Deborah was advised by the Assistant Prosecuting Attorney to file a criminal complaint for violation of the Domestic Violence Final Order. J.A., Vol. II, 619-23, 676-80. Taking this advice, Deborah filed a Criminal Complaint on July 7, 1994. J.A., Vol. I, 357. Based upon the verified complaint, Magistrate Buzzard issued a warrant for Suarez's arrest. J.A., Vol. V, 2246. Responding immediately to the warrant, the Moundsville Police arrested Suarez, and he was lodged in jail pending arraignment. J.A., Vol. IV, 1537-44.

Later that same evening, Officer Murray transported Suarez to Magistrate Court for arraignment. J.A., Vol. IV, 1547. There, Magistrate Mark Kerwood – who had dismissed the 1989 battery charge and had issued both the Family Violence Temporary Protective Order of June 21, 1994, and the Family Violence Final Protective Order of June 23, 1994 – released Suarez on a "personal recognizance" bond. J.A., Vol. IV, 1548. Upon learning that Kerwood had set nominal bond and *before* Suarez was released from custody, Officer Murray immediately approached the magistrate and questioned the propriety of such low bond. J.A., Vol. IV, 1549-52. Kerwood refused to change the bond, instead only asking Murray to "keep

an eye" on Deborah that evening. J.A., Vol. IV, 1551. When Deborah's father questioned Magistrate Kerwood about the recognizance bond on the following day, Kerwood replied, "I screwed up." J.A., Vol. III, 1367.

On July 13, 1994, the Moundsville Police received an anonymous call which advised that Suarez had gone to Deborah's former residence and vandalized the screen door. Upon receiving the call, the Moundsville Police responded within six minutes and notified Deborah's father, who informed the police that Deborah was no longer residing at that address. *Id.*; J.A., Vol. I, 361. Two hours after the anonymous call, Deborah called the Moundsville Police and learned that Suarez had not been arrested. J.A., Vol. I, 362. Other than this incident, from the time of Suarez's arrest on July 7, 1994, until August 6, 1994, no other contact occurred between the Moundsville Police and Deborah or Suarez.

On August 6, 1994, sometime before 1:30 p.m., Deborah, her two children, Scott Semple (who was armed with a .45 caliber automatic handgun), and a friend, James Garrison ("James") went to the residence to remove some remaining items. J.A., Vol. II, 562-65. At approximately 1:30 p.m., the Moundsville Police received a phone call from Deborah, reporting her belief that Suarez had vandalized the home. J.A., Vol. I, 370. Significantly, she advised that no police were requested or required. J.A., Vol. III, 1260-61. Approximately four minutes later, a young girl called from the home. J.A., Vol. I, 370; Vol. III, 1259-60. Almost immediately, Deborah got on the phone, explaining that one of her daughters had hit the re-dial button and stating that police assistance was unnecessary. *Id.*

At 1:43 p.m., Deborah made a frantic call, advising that Suarez was in the house. J.A., Vol. I, 370-71; Vol. III, 1262-64. Arriving at the residence at 1:46 p.m., only three minutes after Deborah's call, the Moundsville Police discovered Deborah, Suarez, Scott, and James dead, all the victims of gunshot wounds. J.A., Vol. III, 1263-64; J.A., Vol. II, 563-65.

II. FACTUAL ERRORS CONTAINED IN PETITION

Respondents submit that many assertions made by Petitioners are completely false or supported only by inadmissible hearsay evidence, which may not be properly considered by this Court. Respondent has brought these inaccuracies and improper references to the attention of the Petitioners and the lower courts in various pleadings, and, even more significantly, the District Court's Order recognized many of these improprieties. However, these assertions are again repeated in the instant Petition.

For example, in the Petition, it is asserted that Deborah decided to drop the 1989 misdemeanor battery charges against Suarez due to threats of violence by Suarez. This contention is supported only by inadmissible "double hearsay" and thus cannot be considered by this Court in the instant appeal.

Petitioners have also asserted that between January 1989 and June 1994, Deborah and her mother frequently contacted the police regarding Suarez's alleged violence. However, this evidence was found inadmissible by the District Court, and Petitioners have not appealed this finding; therefore, this Court cannot properly consider

this "evidence" for the purpose of this Petition.[2] In the instant Petition, the Petitioners represent that the Family Violence Temporary Protective Order of June 21, 1994, prohibited Suarez from contacting Deborah and her "mother and family." This "statement of fact" simply is not factual. J.A., Vol. V, 2450, n.6. Not only does the clear language of the Order not provide such relief, but United States District Judge Frederick P. Stamp, Jr., noted in his written opinion that while the Temporary Order prohibited Suarez " . . . from contacting, telephoning, communicating, harassing, or verbally abusing Petitioner [Deborah] . . . ," the Order *does not* reference Deborah's mother or family. J.A., Vol. I, 324-26.[3]

Additionally, at page 13 of the Petition, it is asserted that in August 1994, Deborah put her house up for sale and "accepted a $500 down payment for the house from a Wheeling couple." (Pet. 13) While this assertion of fact is not material, the record contains absolutely no evidence supporting this allegation.

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[2] *See*, J.A. Vol. V, 2449-50, n.5. Judge Stamp stated in pertinent part: " . . . Defendant challenges these statements by Patricia Rogers as inadmissible hearsay that cannot be considered by the Court when deciding the motion for summary judgment. This Court agrees that . . . [these] statements concerning the number of times Deborah and her mother called the Moundsville Police Department during the years from 1987 through 1994 are hearsay statements. . . . "

[3] *See*, J.A., Vol V, 2450, n.6, wherein Judge Stamp states, " . . . [A]fter reviewing the . . . Order (cites omitted), this court cannot find any reference to Deborah's mother or family in the order. . . . The actual Family Violence Temporary Protective Order . . . does not grant that relief."

Petitioners also assert that the record before the Court reveals evidence that certain unnamed Moundsville Police officers escorted Deborah to her house a few days before her murder in order to help her pack some belongings. The District Court, when presented with this information, found this evidence inadmissible hearsay, and Petitioners have not cited the District Court's ruling as error. Thus, Respondent submits this "evidence" should not be considered for the purposes of this Petition. J.A., Vol. V, 2449-50, n.5.

Finally, contrary to Petitioners' representations, the Moundsville Police made numerous efforts to serve Suarez with the Temporary Order, including patrolling areas often frequented by Suarez and waiting outside Deborah's residence. J.A., Vol. III, 1192-93; Vol. IV, 1595-97, 1653-56. In fact, on June 23, 1994, at 8:19 p.m., Suarez was advised telephonically by Officer Lyons of the Moundsville Police Department of the Temporary Order. J.A., Vol. I, 329 at "2019-30"; Vol. III, 1193-94.

In short, despite having been apprised by both counsel for the Respondents and the lower courts of inaccuracies in their arguments, the instant Petition contains numerous assertions which are inadmissible or simply false.

III. DISCUSSION

A. THE MOUNDSVILLE POLICE'S ACTIONS DO NOT DEMONSTRATE DELIBERATE INDIFFERENCE AND THUS DO NOT CONSTITUTE SUFFICIENT GROUNDS TO FIND THAT DEBORAH SEMPLE'S FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED.

Petitioners' argument that the Fourth Circuit erred because the City of Moundsville enhanced or created a

danger is fatally flawed. Their position is an attempt to avoid the established principal that inaction on the part of a state body *does not give rise to civil liability when such inaction allegedly causes harm. DeShaney v. Winnebago County DSS*, 499 U.S. 189, 195 (1989). Notwithstanding the general rule that the government has no duty to protect its citizens, *DeShaney* and its progeny have set out two exceptions: the "special relationship" theory and the "state-created danger" theory. Under the former, the state has a duty to protect an individual under its care, custody, or control when the state has removed one's ability to care for oneself. *See, DeShaney*, 489 U.S. at 199-201. Under the "state-created danger" theory of liability, a duty to protect emerges after the state *affirmatively* places an individual in a position of danger that the individual would not otherwise have faced. *See, e.g., Greer v. Shoop*, 141 F.3d 824, 827-28 (8th Cir. 1998). The clear rationale behind this "state-created danger" theory is that "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *DeShaney*, 499 U.S. at 199-200. Restated, "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id.*

Recent law from the Fourth Circuit reveals that a theory of recovery based upon a "special relationship" or

a "creation of danger" is inapplicable absent some sort of custodial relationship or affirmative action. *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995), *cert. denied*, 516 U.S. 994 (1995). Significantly, Petitioners neither claim nor does the admissible evidence in this case provide a scintilla of evidence that Respondent placed any Petitioner or his/her decedent(s) in a custodial situation. Further, as discussed *infra*, Petitioners cannot establish the essential element of their claim that any of their alleged constitutional deprivations arose from a municipal policy that was the "moving force" behind their injuries. *See, Bd. of Co. Comm'rs of Bryan Co., Oklahoma v. Brown*, 520 U.S. 1283 (1997). Interestingly, Petitioners no longer argue that a "special relationship" existed between the parties, and instead now focus entirely upon a "creation of danger" theory. To do so, however, is a fatal flaw. In *Pinder, supra*, when discussing the issue of non-custodial "special relationships," the Fourth Circuit stated definitively that absent a custodial relationship, a "special relationship" giving rise to police or municipal liability for alleged constitutional violations does not arise:

> *Promises* do not create a special relationship – custody does. Unlike custody, a promise of aid does not actually place a person in a dangerous position and then cut off all outside sources of assistance. Promises from state officials can be ignored if the situation seems dire enough, whereas custody cannot be ignored or changed by the person it affects.

Pinder, 54 F.3d at 1175 (emphasis added). Here, no party disputes that neither Petitioners nor their decedents were, at any time relevant, in the custody or under the control of Respondent.

Although Petitioners attempt to distinguish the principles set forth in *Pinder* by asserting that in the instance case more than a single promise was made, *Pinder* draws no such distinction. In fact, the *Pinder* Court expressly states that *promises* do not create a special relationship. Moreover, Petitioner's sole reference to any record evidence in support of their "creation of danger" argument, other than the opinion of their expert, is an inadmissible hearsay statement attributed to Suarez that he felt "in triumph" over the Moundsville Police. (Pet. 21-22.) Even assuming *arguendo* that this statement could be properly considered by this Court, it is insufficient to establish that the Respondent created the danger which led to the events of August 6, 1994. As such, the lower courts did not err in holding that Petitioners' substantive due process rights were not violated.

Petitioners' argument is also flawed because Respondent did not affirmatively place the Petitioners or their decedents in a position of danger. The mere fact that the state is aware that a person is in danger does not create a duty to protect, even if the state expresses a willingness to protect the victim. *DeShaney*, at 197-98, n.4. The state, instead, *must take some action* which places the victim(s) in a dangerous position, increases the potential danger, or deprives the victim of his/her ability to use self-help. 857 F. Supp. 1203, 1209. As stated *supra*, promises do not constitute "affirmative action."

In support of their arguments, Petitioners cite, *inter alia*, *Jensen v. Conrad*, 747 F.2d 185 (4th Cir. 1984), for the proposition that affirmative duties arise *not* because the state limited freedom of personal action but because the state "selects" an individual and places him in a position

of danger. *Id.* at 194. Significantly, Petitioners fail to reveal that the *DeShaney* Court, having cited this case and several others like it, said in no uncertain terms, "We reject this argument." 489 U.S. at 197-98, n.4.

Petitioners' reliance upon *Gardner v. Reed*, 986 F.2d 1122 (7th Cir. 1993), *cert. denied*, 510 U.S. 947 (1993), is also misplaced, and its holding, in fact, bolsters Respondent's position. The *Reed* Court found that the police created a danger by removing a sober driver from a vehicle, allowing an intoxicated passenger to become the vehicle's operator. The intoxicated driver thereafter became involved in an accident, injuring other individuals. In other words, the state action of removing the sober driver from a vehicle and leaving an intoxicated passenger in the car foreseeably and affirmatively created a danger. However, in the instant matter, the most that can arguably be said is that the Respondent failed to adequately protect Petitioners from a known danger, Michael Suarez. This simply is insufficient to give rise to liability.

Petitioners' reliance upon *Smith v. City of Elyira*, 857 F. Supp. 1203 (N.D.Oh. 1994), *Sadrud-Din v. City of Chicago*, 883 F. Supp. 270 (N.D.Ill. 1995), and *Dwares v. City of New York*, 985 F.2d 94, 99-100 (2d Cir. 1993), is also misplaced. Contrary to Petitioner's contention that the *City of Elyira* Court denied summary judgment with respect to a substantive due process claim "consistent" with the facts in the instant case, instead, the *Elyira* Court held the City could be liable for the actions of its officers if the alleged constitutional violations were caused by affirmative acts done pursuant to an official policy or custom. Specifically, the Court found:

> . . . [T]he facts here support a claim that the police officers' affirmative acts created or increased the danger to Karen Guerrant. The police officers did not merely fail to perform their duties; *they told Alfred Guerrant that he did not have to leave, and advised him to go back if Karen tried to throw him out.* Thus, this case is more akin to the facts in *Nishiyama v. Dickson County, Tennessee*, 814 F.2d 277 (6th Cir. 1987), in which the police authorized an inmate to use a marked patrol car, and the inmate used the apparent authority of the police to stop an automobile and murder the occupants. Here, Alfred used the apparent authority given to him by the police to remain in his ex-wife's home against her will, and later killed her.

Id. at 1210 (emphasis added). Here, however, the Moundsville Police did not knowingly leave Suarez with Deborah, did not tell Suarez that he did not need to leave Deborah's residence, and never advised Suarez to return to Deborah if she threw him out. Thus, the facts of *City of Elyira* and its holding are inapposite to those in the instant case, where the only alleged affirmative acts taken by the Moundsville Police are no more than "mere promises."

The case of *Sarud-Din, supra,* is also inapposite. *Sarud-Din* involved a City of Chicago police officer's murder of his wife. In finding that the City acted affirmatively, the Court gave great weight to the fact that the victim was murdered by an officer using a weapon issued by the City despite the City's knowledge of the officer's repeated threats to kill his wife. More specifically, the *Sarud-Din* Court found that the City had acted affirmatively, not only by training and outfitting its employee

with the means to exercise deadly force, but also by failing to reclaim the weapon even after the City's awareness that its employee was unfit to exercise police authority. *Id.* at 278. No such comparison can be made to the instant case.

In *Dwares, supra,* it was alleged that police officers not only stood by idly while plaintiffs were beaten, but also (1) "skinheads" conspired with the police, (2) the police *personally* witnessed the attack and did nothing, and (3) a "skinhead" told a reporter that the police had given them license to attack a plaintiff. *Id.* at 99-100. Significantly, while the Court recognized the propriety of claims against the individual officers, the Rule 12(b)(6) dismissal of § 1983 claims against the *municipality* was upheld.

Certainly, in *Dwares,* the alleged "affirmative acts" were far more egregious than those alleged in the instant case. At worst, the record in this case, where no individual police officer has been sued, may establish isolated instances of police officer *inaction* resulting from the exercise of an individual officer's discretion. Finally, no evidence supports Petitioners' contention that any affirmative action taken by the Moundsville Police was in furtherance of an unconstitutional municipal custom or policy that created a danger to the Petitioners. In fact, as discussed *infra,* Petitioners have failed to show any unconstitutional custom or policy of the Moundsville Police.

Thus, for the foregoing reasons, the Fourth Circuit did not err in affirming the District Court's ruling that

under the facts of this case, the Respondent is not liable for alleged § 1983 violations.

B. THE FOURTH CIRCUIT DID NOT ERR IN HOLDING THAT JAMES GARRISON AND SCOTT SEMPLE MAY NOT MAINTAIN CLAIMS FOR PROCEDURAL DUE PROCESS VIOLATIONS UNDER § 1983.

Although the lower courts have denied all of Petitioners' procedural due process claims, only those of James Garrison and Scott Semple have been cited as error in the instant Petition. Specifically, the courts *sub judice* dismissed Petitioners' procedural due process claims, *inter alia,* because the statutory provisions upon which they relied do not create an entitlement.

To maintain a meritorious procedural due process claim based upon a liberty or property interest created by a state law, a plaintiff must "show that the procedures that [were not followed] were enacted pursuant to a substantive constitutional obligation. . . . " *Doe by Fein v. District of Columbia,* 93 F.3d 861, 868 (D.C. Cir. 1996). Analysis of this type of claim, as noted by the United States District Court, is as follows:

> [a]ll procedural due process claims are evaluated under a two part inquiry. First, a court must assess whether an "individual possess[es] a protected interest such that the due process protections [are] applicable. . . . " *Farthing v. City of Shawnee,* 39 F.3d 1131, 1135 (10th Cir. 1994). If so, then the court must inquire whether "the individual [was] afforded an appropriate level of process."

J.A., Vol. V, 2471.

Petitioners attempt to establish this right by claiming entitlement under W.Va. Code § 48-2A-9(b) and (c) and § 48-2A-10(c). More specifically, Petitioners James Garrison and Scott Semple contend that the Moundsville Police failed to comply with entitlements to timely service of domestic violence protective order and notification of remedies available to domestic violence victims. However, even if the Moundsville Police failed to comply with W.Va. Code § 48-2A-9(b) and (c) and § 48-2A-10(c)(a), this failure does not create a "property right" on behalf of these Petitioners. As noted by the United States District Court:

> . . . although a statute may prescribe and codify certain procedures for dealing with domestic violence . . . , the statute does not automatically create an entitlement that can be enforced by individuals. Rather, before the statute can give rise to a constitutionally protected entitlement, it must be based on an independent, substantive constitutional right.

J.A., Vol. V, 2474. Absent a custodial relationship, individuals do not have a substantive constitutional interest in receiving protection from the police. *DeShaney*, 499 U.S. at 195. Moreover, the Fourth Circuit established in *Pinder II* that a plaintiff cannot recover on a creation of danger theory simply by pointing to police inaction, such as a failure to give information and to timely serve a protective order.

In order for a due process entitlement to exist, some contact between the state and the individuals claiming the deprivation must be established. Petitioners gloss

over the fact that the record is void of even a scintilla of evidence of any contact between James or Scott and the Moundsville Police which would give rise to any entitlement to procedural due process rights. As such, the Petitioners' claims of a violation of procedural due process violations must fail.

Further, procedural due process depends upon whether the state statutory scheme protects a *substantive* constitutional right of the plaintiff. *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983). Since the *substantive* interests here at issue – protection from private violence from Suarez – have been rejected by the lower courts and since neither James nor Scott has assigned error to the same, Petitioners cannot claim alleged deprivations of the procedures designed to protect a non-enforceable right.

As noted by the United States District Court, *Doe v. District of Columbia*, 93 F.3d 868 (D.C. Cir. 1996), is directly on point. As this Court is aware, both the Fourth Circuit and the District Court have held both James' and Scott's substantive due process claims are "fundamentally without merit" because neither was in the custody of the Moundsville Police as required under *Pinder*. Moreover, neither have shown that the police created or enhanced the danger faced by the two. Finally, neither James nor Scott have presented evidence sufficient to create an issue of genuine material fact that the actions taken by the police which allegedly increased the danger resulted from a custom or policy of the Moundsville Police.

Most significantly, the District Court found that the two men's procedural due process rights were not violated because the above-referenced statutes simply did

not apply to them. However, the Court found five (5) additional reasons for denial of Petitioners' claims:

(1) The W.Va. Statutes cited by plaintiffs as the basis for the procedural due process claim do not give rise to a liberty or property interest protected by the Fourteenth Amendment;

(2) Even if the statutes required advising Deborah of available assistance, thereby providing her with a property interest, she was, in fact, advised of said rights upon at least one occasion;

(3) Petitioners failed to show that the Family Violence Temporary Protective Order vested in Deborah any cognizable property interest in having the order served upon Suarez and receiving police protection;

(4) Petitioners failed to establish that Scott or James had a cognizable property interest under the protective order; and

(5) Petitioners failed to show that any failure to advise Scott or James of available assistance and to serve the protective order was a result of a municipal custom or policy.

Similarly, the Fourth Circuit found that there was no evidence of direct contact between James and Scott and the police. (Pet. App. 12a) Accordingly, the Petitioners' argument that they possessed a procedural due process entitlement which was violated by the Moundsville Police must be rejected.

C. THE 4TH CIRCUIT DID NOT ERR IN RECOGNIZING THAT THE RECORD DOES NOT CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO THE EXISTENCE OF A MUNICIPAL POLICY OR CUSTOM OF THE MOUNDSVILLE POLICE DEPARTMENT WHICH COULD COMPRISE A CONSTITUTIONAL VIOLATION.

Petitioners' third and final argument is that the Fourth Circuit erred in holding that the record in this case does not create a genuine issue of material fact regarding the existence of an unconstitutional municipal custom or policy. Proof of an unconstitutional policy or custom is absolutely essential to Petitioners' case, because, to impose liability, Petitioners must prove the existence of an official custom or policy that caused a deprivation of a constitutional right. *Monell v. New York City Dept. Of Social Services*, 436 U.S. 658, 694 (1978).

Without question, the domestic violence policy of the Moundsville Police is not at issue, for Petitioners' expert, Lee S. Weinberg, admits that the Moundsville Police's domestic violence policy was "very good."

> Q: . . . The policy itself you say is a very good policy? Is that correct?
>
> A: It is indeed.

J.A. Vol. IV, 1837. Instead, Petitioners rely entirely upon Dr. Weinberg's opinion that the Moundsville Police's custom of not properly training its officers regarding domestic violence constitutes a possible unconstitutional custom. However, applying well-settled law to the instant facts shows this argument is flawed.

First, a plaintiff must point to a specific deficiency and not a general ineffectiveness of the training to maintain a deprivation of constitutional rights. *Spell v. McDaniel*, 824 F.2d 1380, 1390 (4th Cir. 1987). Only those deficiencies in police training policies that result from policymaker fault of at least the degree of deliberate indifference to or reckless disregard for the constitutional rights of persons within police force jurisdiction can give rise to municipal liability; mere negligence on the part of policymakers is not sufficient. *Id.* Further, the Fourth Circuit has stated that a municipality can only be said to have been deliberately indifferent to a training need:

> . . . if, in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights. . . .

Jordan v. Jackson, 15 F.3d 333, 341 (4th Cir. 1994) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)).

Petitioners' expert, Dr. Weinberg, admits that the Moundsville Police's provision of eight (8) hours of domestic violence training for its officers was "good."

> Q: . . . But the fact that there's eight hours of training, you say, is more than adequate in terms –
>
> A: I didn't say adequate. *I said it's good.*

J.A. Vol. IV, p. 1837 (emphasis added).

In fact, Petitioners' sole attempt to specify deficiencies in training are based upon Dr. Weinberg's criticism,

which is based upon the deposition testimony of unidentified officer(s) who allegedly did not have specific recollections of certain documents being distributed during training and their failure to " . . . know what was told to them with respect to a particular issue." J.A. Vol. IV, 1837. Manifestly, such criticism, at worst, can rise to no more than a general ineffectiveness of training and is certainly insufficient to the level of "deliberate indifference to a training" necessary to maintain a § 1983 claim and establish liability upon the City of Moundsville.

In conclusion, as noted by the Fourth Circuit, when the facts of this case are viewed in the light most favorable to Petitioners, the most that could possibly be proven is " . . . that there *may* have been a general ineffectiveness in training." [Pet. 10a, 11a (emphasis added)]. For these reasons, Petitioners' argument that the Moundsville Police maintained an unconstitutional custom should be rejected.

IV. CONCLUSION

For the foregoing reasons, Respondent, the City of Moundsville, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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